REPLY BRIEF FOR PETITIONER SOUTHWESTERN CABLE CO.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 21,183

SOUTHWESTERN CABLE CO.,

Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

Case No. 21,192

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and
TRANS-VIDEO CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

ARTHUR SCHEINER
GILBERT B. LESSENCO
1343 H Street, N. W.
Washington D.C. 20005

Counsel for Petitioner,
SOUTHWESTERN CABLE CO.

Of Counsel:

Tuttle & Taylor
609 South Grand
Los Angeles, California

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REPLY BRIEF FOR PETITIONER SOUTHWESTERN CABLE CO.

SUMMARY OF ARGUMENT

1. The Commission lacks statutory authority to issue restraining orders unless provided in Section 312.

2. The temporary relief ordered by the Commission in the instant case is unlawful in that it (1) is not specifically authorized by law; (2) is inconsistent with the other powers granted to the Commission; (3) is issued without a hearing and is not limited to a shortly prescribed period of time; (4) is not issued in conjunction with a judicial or administrative proceeding but restrains lawful behavior pending a legislative hearing; and (5) is granted without a showing of irreparable injury or other findings of imminent public or private injury.

SUMMARY OF FACTS

Petitioner operates a community antenna television system pursuant to a 30-year franchise issued by the City of San Diego. The franchise became effective October 30, 1964, and extends to an area lying north of the San Diego River Channel within the corporate limits of San Diego. The CATV system commenced service on December 22, 1965. For most of that time, the Commission neither claimed nor exercised any authority over CATV systems which relied upon off-the-air pickup.

It was not until March 8, 1966, that the Commission purported to assert regulatory authority over CATV systems relying, as Petitioner does, upon off-the-air pickup. These regulations were contained in the Second Report and Order, Dockets 14895, 15233 and 15871, 31 Fed. Reg. 4540. Sections 74.1107 and 74.1109 of the Commission's new regulations are relevant in this instance.

It is conceded that the Commission's existing regulatory scheme in no way prohibits Petitioner's present or proposed operations. Sec-

tion 74.1107(a) and (c) imposes certain restrictions upon the extension of television signals *beyond* the Grade B contour of a broadcasting station. Section 74.1107(d) provides, however, that these restrictions are not to apply to CATV systems which were in operation on February 15, 1966, as long as signals are not extended beyond their Grade B contour into "new geographical areas."

However, Section 74.1109 of the Commission's rules provides that the Commission may "impose additional or different requirements . . ."

On March 17, 1966, Midwest Television, Inc., licensee of KFMB-TV, San Diego, filed a petition with the Commission pursuant to Sections 74.1107 and 74.1109 of the Rules. The petition, and the April 4, 1966 supplement, requested the Commission to:

> (1) Grant Midwest immediate temporary relief by directing Petitioner, and other CATV systems, to "cease and desist from delivering Los Angeles signals beyond the boundaries of the geographical areas in which it was operating on February 15, 1966 . . ."; and
>
> (2) grant Midwest permanent relief confining carriage of Los Angeles signals by such CATV systems.

Petitioner, in its opposition, alleged among other things that its system was not carrying any station beyond its Grade B contours. Moreover, on May 31, 1966, a petition was filed with the Commission in Case No. 21192, pointing out that in another case pending before it (Docket 16575) testimony of the Commission's expert witness established that the Grade B contours of all Los Angeles VHF stations fell within the city limits of San Diego.

On July 25, 1966, the Commission issued its Memorandum Opinion and Order now under review, granting Midwest's request for temporary relief. The Commission directed Petitioner to confine delivery of the

Los Angeles signals carried on its system to subscribers within the areas served on February 15, 1966, and prohibited similar service to others within Petitioner's overall franchise area. With respect to the temporary relief, the Commission concluded that such relief ". . . is necessary and appropriate 'before consequences possibly adverse to the public may develop'." (Memorandum Opinion and Order, Par. 20, R. 589)

In the Brief filed by Respondents in this Court, the Commission admits that (1) the Commission has assumed that Petitioner's systems are within the Grade B contours of the Los Angeles stations; and (2) the Commission has not found that Petitioner's operations are in violation of Section 74.1104 of the Rules, or any other substantive rule or statutory provision. (Brief for Respondents, p. 33)

Accordingly, Respondents concede that Petitioner is not charged with the violation of any Commission rule or statutory provision. Respondents also concede that Section 312 of the Federal Communications Act requiring a hearing before the issuance of a cease and desist order does not authorize the restraints imposed in this case. The purported justification for the restraint of Petitioner's lawful activities is the claim that the Commission, based on the general powers vested in it, has authority to issue "temporary" restraints without regard to the Congressional standards contained in Section 312.

It is respectfully submitted that this position is a clear exposition of an unbridled exercise of governmental powers contrary to established judicial authority and traditional legal and constitutional concepts.

I.

Respondents and Intervenors argue in their briefs that the temporary relief issued by the Commission is not a cease and desist order in that it does not estop a continuation of Petitioner's existing service but only prevents its expansion. It is asserted that the Commission sought to preserve the *status quo* rather than disturb it. Yet, the mere fact that the Commission's order is so limited does not make it any less a cease and desist order.

Cease and desist orders are in the nature of injunctions. *Forkosch Administrative Law* (1956), § 270, at 499, § 277 at 515. *National Labor Relations Board v. Colten,* 105 F.2d (C.A. 6th Cir. 1939) 179, 183. Like injunctions, cease and desist orders have always been directed not only against existing evils, but also against the threat of future evil. Injunctions are of two types: (1) prohibitory injunctions which preserve the *status quo* and operate to restrain the commission or continuance of an act; and (2) mandatory injunctions which contemplate a change in the *status quo* and command an act to be done or undone. 28 Am. Jur. § 18, pp. 508, 509. Respondents argue that the restraining order issued by the Commission is prohibitory and not mandatory; that it is not a cease and desist order; and may be issued by the Commission in any manner it elects. But the prospective nature of the order does not distinguish it, however, from cease and desist orders. Cease and desist orders, as implied in the very term, may, like injunctions, be of dual character, containing both prohibitory and mandatory provisions. 28 Am. Jur. § 18 at 509. ". . . a cease and desist order is of the nature of injunction, and its affirmative provisions are analogous to those of one that is mandatory." *N.L.R.B. v. Colten,* 105 F.2d (C.A. 6th Cir. 1939) 179, 183.

Section 312 of the Communications Act specifically spells out the prerequisities for the issuance of a cease and desist order. Section 312(b) limits the Commission's power to cases where a person (1) has

failed to operate substantially as set forth in his license, (2) has violated various provisions of the United States Code, or (3) has violated the rules or regulations formulated by the Commission. Section 312(c), moreover, provides for an oral hearing before the Commission prior to the issuance of the cease and desist order. Neither of these requirements has been complied with in the instant case. The first requirement, a violation of law, regulation or license, is completely inapplicable because Petitioner had, in fact, been engaged in a lawful undertaking. The second requirement, being procedural in nature, the Commission could have complied with but chose instead to neglect, knowing that the substantive requirement of unlawfulness was not available to justify its proposed order.

A cease and desist order remains one even when it goes by any other name. Failing to comply with the standards that Congress imposed upon the Commission in the exercise of this power, the temporary relief granted by the Commission in the instant case is unauthorized and invalid.

Arguing that the restraining order issued by the Commission is intended against future rather than existing evils and that, therefore, it requires lesser standards is sheer sophistry. In fact, contrary to the implications of Respondents' Brief, it appears that even greater caution must be exercised in cases involving contemplated and, therefore, uncertain threats than in the case of existing evils -- where the evil is more easily demonstrable. ". . . the power to grant injunctive relief is never exercised to allay mere apprehension of injury . . ." 28 Am. Jur. § 29 at 520. *Connecticut v. Massachusetts*, 228 U.S. 660, 75 L. ed. 602; *Continental Baking Co. v. Woodring*, 286 U.S. 356, 76 L. ed. 1155.

II.

Respondents and Intervenors state that instead of relying upon the specific cease and desist procedures contained in Section 312 of the Communications Act, the Commission acted in pursuance of the general authority vested in it under Sections 4(i) and 303(r) of the Act.

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), provides that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent* with this Act, as may be necessary in the execution of its functions." (Emphasis added.) As previously pointed out, this subsection is contained in a section entitled "Provisions Relating to the Commission" and dealing with such housekeeping matters as the number and salaries of the Commissioners, the location of the principal office, the overtime pay to staff engineers, expenditure for rent, office supplies, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides that the Commission is to have an official seal. 47 U.S.C. § 154(h). It is perfectly plain that subsection 4(i), on which the Commission is relying in its desperate search for authority, was never intended as grant of authority for the extraordinary sanction involved in the instant case. The attempt by the Commission to circumvent the specific language of Section 312 by supposedly proceeding under the implied powers of Section 4(i) and, thus, according an admittedly law-abiding citizen lesser protection than accorded to one charged with violations of the law is certainly *inconsistent* with the Congressional formula and plan as contained in the Act.

Respondents also rely upon Section 303(r) of the Communications Act. Respondents assert (Brief p. 36) Commission's implied authority by quoting the section's language to the effect that the Commission shall "(r) make such rules and regulations and prescribe such restrictions

and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . ." Here too the desperate groping search for authority comes to naught. Section 303 of the Act contains comprehensive authorization for the regulation and classification of radio stations, the assignment of frequency bands, the prescription of qualifications for station operators, and even the suspension of operator licenses (*after oral hearing*). Section 303(r) is intended to give the Commission some discretion in regulating radio stations. It is completely specious and illogical to assert that such authority overrides the special cease and desist provisions of Section 312 and is sufficient to grant the Commission broad injunctive powers.

Petitioner, in its main Brief, effectively demonstrated that the action now undertaken by the Commission is contrary to prior Commission rulings (Brief for Petitioner, pp. 12-55) and contrary also to the Commission's own explanations, in the Second Report and Order, as to how sanctions under new Rule 74.1109 were to be exercised. (Brief for Petitioner, pp. 11-12)

Petitioner also reviewed the legislative history of Section 312, which Respondents now discard as unnecessary in their claim for broader power, to demonstrate the narrow grant of sanction powers to the Commission. Prior to the adoption of Section 312, the Supreme Court recognized this limitation on the Commission's authority and held that previous cases before the Court "make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." *Regents of Georgia v. Carroll,* 338 U.S. 586, 598-599 (1950). Noting also that the Commission had sought additional sanctions from Congress, the Court pointed out that these requests" . . . did not go beyond asking for power to issue a cease and desist order against a licensee." (*Id.* at 602) Section 312 was subsequently adopted by Congress as directed

to meet this particular need and no more. (Brief for Petitioner, pp. 15-18)

Petitioner's Brief also cited controlling judicial precedents to the effect that suspension of an existing letter of registration could not be undertaken without prior hearing. *Standard Airlines, Inc. v. Civil Aeronautics Board,* 85 U.S. App. D. C. 29, 177 F.2d 18 (1949). Likewise, the Supreme Court has held that cease and desist orders cannot be extended beyond the specific limits established by Congress. *N.L.R.B. v. Express Pub. Co.,* 312 U.S. 426, 434 (1941). Even greater caution had been shown towards general injunctive powers. Referring to an order of the Federal Maritime Board prohibiting a voluntary association of steamship companies from assessing fines, the Court of Appeals for the District of Columbia Circuit, likewise, declared:

> "The power which the Board now claims is in many ways a drastic one, and, in fact, more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct *deemed in violation of law* . . . We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency." (Emphasis supplied) *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Board,* 112 U.S. App. D.C. 290, 302 F.2d 875, 880 (1962).

The sanction undertaken by the Commission in the instant case falls squarely within the warning voiced above.

The Federal Communications Commission was not satisfied with the powers lawfully granted it by Congress. It was not satisfied with the cease and desist power against "conduct deemed in violation of law," and which required that a hearing first be held. In the instant case, Respondents are asserting their newly discovered injunctive right, without any statutory authority, to proceed against conduct not deemed in violation of law and to do so without an opportunity for a prior hearing.

The injunctive sanction claimed by the Commission in the instant case is one jealously guarded by our courts. In *Federal Trade Commission v. Dean Foods Co.*, 16 L. ed. 802 (1966), decided only recently by the United States Supreme Court, the question was not whether an administrative agency itself could issue an injunction, but whether it could seek one in the appropriate courts. The argument of respondent in that case was that the Federal Trade Commission was a creature of statute and that Congress had failed to give it express statutory authority to seek such preliminary relief. In deciding for respondents, the Court said: "Congress has never restricted the power which the courts of appeal may exercise under that Act [Judiciary Act of 1789]. Nor has it withdrawn from the Commission its inherent standing as a suitor to seek preliminary relief in courts of appropriate jurisdiction." (At 809)

In the *Dean Foods* case, the Federal Trade Commission had commenced administrative action to determine whether a proposed merger violated the antitrust law. In connection with this action, the Commission also applied to the courts for temporary relief, and was required to comply with the standards of proof applicable to such equitable relief. In the instant case, the Respondents claim this same right all to itself, without specific statutory authority and without compliance with the substantive and procedural requirements applicable to injunctive relief.

It has been said an injunction is "an extraordinary remedial process which is granted, not as a matter of right but in the exercise of sound judicial discretion." *Hurd v. Hodge* (1948), 334 U.S. 24, 36, 92 L. ed. 1187, 68 S. Ct. 847, per Frankfurther, concurring. The Supreme Court of the United States has previously said:

> "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly

> be anticipated from the defendants' conduct in the past." *N.L.R.B. v. Express Publishing Co.* (1941), 312 U.S. 426, 435, 85 L. ed. 930, 61 S. Ct. 693.

Neither Congress nor the courts has treated lightly the grant of the equity injunction power to administrative agencies. Only one limited form of this power, the issuance of cease and desist orders, was granted to administrative agencies to any extensive degree whatsoever: yet, even this power must rest on express Congressional authority and its use is prescribed by the requirements of a hearing and a finding of unlawfulness. Moreover, in enforcing such orders, administrative agencies must resort to the contempt powers of the courts, since courts only may exercise this power. Schwartz, *American Administrative Law* (2nd Ed.) 104.

Congress' caution in disbursing injunctive powers to federal administrative agencies clearly demonstrates that such power cannot be vested by remote implication. Since Congress has specifically provided the Commission with the limited cease and desist power under Section 312 of the Communications Act, there is no ground for the Commission's argument that even broader injunctive powers — and without time limits — were intended for it by implication. Such, indeed, would be a "delegation running riot." Per Cardozo, concurring, in *Schecter v. United States,* 295 U.S. 495, at 553 (1935).

The Commission's claim of implied power in the instant case is objectionable, furthermore, because it is sought not in conjunction with judicial or administrative proceedings, but in connection with what are, in fact, legislative hearings. The distinction is most significant. "A judicial inquiry," said Justice Holmes, "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by

making a new rule to be applied thereafter . . ." *Prentis v. Atlantic Coast Line Company*, 211 U.S. 210, 226 (1908).

Since in the instant case it is admitted that Petitioner in no way violates existing laws, rules or regulations, it inescapably follows that what the Commission seeks to do is to restrain (and punish) conduct not now prohibited, but such as may become prohibited upon the termination of the Commission's proposed legislative hearings. In so doing, the Commission is seeking for itself powers that Congress and the courts of this nation could not take upon themselves — the power to punish and restrain certain acts before such acts become, in fact, prohibited and before notice of such prohibitions is publicly given. In enjoining Petitioner in what is lawful, the Commission not only acts without statutory power, but infringes upon the constitutional prohibition against bills of attainder and *ex post facto* laws (Section 9, Article 1, Constitution of the United States) and the Fifth Amendment guaranty of "due process."

Final comment should also be made on the cases upon which Petitioner and Respondents mainly rely.

Respondents (at pp. 46 and 47 of their Brief) have sought to justify the exercise of injunctive powers by the Commission by relying upon the "general rule making power" contained in Sections 4(i) and 303(r) of the Communications Act. Respondents cite the Supreme Court decisions in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-203 (1956), and in *National Broadcasting Company v. United States*, 319 U.S. 190, 218-220 (1943), in support of this proposition. These cases do not deal, however, with the question of the Commission's present claim for *injunctive equity powers*. They merely deal with the specific and limited question whether the Commission, acting within its well-defined licensing capacity, may formulate rules for the licensing and regulation of broadcasting not specifically authorized by statute. This

is obviously a totally different question. The Supreme Court's recognition of the rule making powers contained in Sections 4(i) and 303(r) relates to matters entrusted to the Commission and certainly do not encompass a grant of the carefully guarded injunctive power.

Both Respondents and Intervenors have expended a great amount of effort to distinguish between the cases previously cited by Petitioner and the instant facts. In so doing, Respondents and Intervenors reach the ludicrous result of advocating more procedural due process to an alleged law violator than to one who abides by it. They thus distinguish between an administrative agency's suspension of a prior license (there they assert a right to hearing exists) and the instant case (where no prior license was required) and, therefore, they assert no concomitant right to hearing need be recognized before such activity is enjoined. Referring to the *Standard Airlines* case and the *Federal Maritime Board* case cited by Petitioner, Respondents seek to distinguish them from the situation in the instant case as follows: "In the first place, both of those cases involved a summary suspension of activities previously approved by the agency, rather than a stay of planned operations not yet in being, pending a determination as to whether they should be authorized." (Brief for Respondents, p. 49) What Respondents clearly fail to point out is that the activity carried out and proposed to be carried out by Petitioner needs no Commission authorization whatsoever as long as it is, as in this case, beyond the Grade B contour. In summary, it is apparent that Respondents' distinctions are completely specious. What they argue is that a case involving termination of a privilege for an alleged misfeasance requires more due process protection than a case involving a person's deprivation of a right to do something lawful in the first place. As previously stated, what the Commission is seeking in this case is to estop Petitioner's lawful activity pending a legislative hearing by the Commission to determine whether the particular lawful activity of Petitioner should be prohibited.

Finally, apart from Respondents' lack of authority to take upon itself injunctive powers exercised without a hearing and not strictly limited by time requirements, it is submitted again that no "irreparable injury" to either the public interest or to Intervenors was demonstrated to justify the drastic action in the instant case. Respondents, in their own Motion for Reconsideration of Stay Order and Opposition to Motion for Stay, before this Court, admitted with regard to the need for its restraining order as a protection for the public: "While such addition of new subscribers would not by itself cause any immediate public harm in terms of competitive effect upon the service of the local television stations, it would constitute exactly the sort of entrenchment which the Commission is trying to avoid. For it would mean additional disruption to the public in the event it is determined in the hearing to be held that CATV systems in San Diego should not be permitted to bring in Los Angeles signals." (p. 14)

The facts in this case certainly do not fall within the standards which have justified the traditional exercise of the injunctive power. The restraining order issued in the instant case, indeed, must fall because it is contrary to existing law that 'Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared or liable to occur at some indefinite time in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1930).

CONCLUSION

The Commission is without authority to restrain Petitioner's operations which comply with all statutory and administrative requirements.

Respectfully submitted,

Arthur Scheiner
Gilbert B. Lessenco
Nicholas Kittrie
1343 H Street, N. W.
Washington, D. C. 20005

Counsel for Petitioner
Southwestern Cable Company

Of Counsel:

Tuttle & Taylor
609 South Grand
Los Angeles, California 90017